The Solicitors' Journal

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CURRENT TOPICS

His Honour John Graham Trapnell, K.C.

WITH the death of His Honour JOHN GRAHAM TRAPNELL, K.C., on 3rd November, at the age of seventy-three, an able and popular member of the bench passed from our midst. He became an official referee of the High Court in 1943, having been Judge-Advocate of the Fleet from 1933 to 1943. In 1903 he was called to the Bar and read in chambers with Clavell Salter, later Mr. Justice Salter. After a busy junior practice on the Western Circuit he took silk in 1931. In 1932 he became Recorder of Plymouth. In the 1914–18 war he served in the R.N.V.R. He was universally liked and respected and his death will be widely mourned.

The Queen at the Middle Temple

THE first normal Grand Day at the Middle Temple for ten years was the first Grand Day at Middle Temple to be graced by the presiding presence of a Queen. On 2nd November HER MAJESTY THE QUEEN, as Treasurer of the Middle Temple, attended dinner in the ancient Middle Temple Hall, which is now restored after the scars of war. Both the KING and the QUEEN complete their terms as Treasurers of the Inner Temple and the Middle Temple, respectively, at the end of the present year. This close association of their Majesties with the Inns of Court is a happy augury for the whole of the legal profession and for the democratic traditions for which it stands.

Fusion and Nationalisation

THE Recorder of Stoke-on-Trent, Mr. ERIC SACHS, K.C., expressed the view, at the annual dinner on 21st October, 1949, of the North Staffordshire Law Society, that the legal profession might be subject to political pressure within the next fifteen or twenty years to bring about, first, fusion of their two branches, and then nationalisation. These apprehensions are not, it would seem, based on any considerations arising out of the Legal Aid and Advice Act, for Mr. Sachs has already stated in a lecture on this subject that the independence of the profession is safeguarded in that legislation. The fact, however, that trends in the direction of loss of independence can be discerned outside this legislation should awaken the profession to the dangers which threaten in a not very distant future. Whatever the arguments may be for and against fusion of the two branches of the profession, there can be no doubt that fusion might facilitate the work of the nationalisers. In an age when every human activity seems to be threatened by centralisation and by planning for planning's sake, the legal profession, on which the ordinary citizen depends for his protection against threats by government to his individual rights and liberties, must be continuously on its guard against the danger that it may itself fall under the domination of an all-powerful executive.

The Law Society of Scotland

WE extend our congratulations to the profession in Scotland on the occasion of the establishment of The Law Society of Scotland on 28th October. Among the guests at the inauguration were Mr. L. S. HOLMES and Mr. T. G. LUND, vice-president and secretary of The Law Society of England. We hope that this important step in the development and history of the profession north of the Border will enable it to march forward to its new goals in honourable independence, and without fear of interference by the executive. The postponement of operation of a great part of the Legal Aid and Advice (Scotland) Act will give further time for all parties to reconsider their hopes and apprehensions with regard to this new service.

The Manchester and Salford Poor Man's Lawyer Association

THE report for 1948–49 of the Manchester and Salford Poor Man's Lawyer Association shows that 4,009 cases were dealt with during the year, consisting as to 45 per cent. of matrimonial and family cases, as to 13 per cent. of landlord and tenant cases, as to 7 per cent. of damage and accident cases, as to 8 per cent. of workmen's compensation and industrial injuries cases, and the bulk of the remainder consists of libel and slander, wills and intestacies, master and servant, and money matters. The committee expressly emphasise their gratitude to The Law Society for their continuous and determined efforts to see that the Rushcliffe Report is implemented by legislation. The report states that the committee have resolved that no good purpose would be served by attempting to continue the work of the association after the new Act has come into operation (this will now be taken to refer, presumably, to the time when the whole Act is operative). The committee thank all those who help the association's work, and are confident that the association's record of unselfish service by the legal profession to those in need will be maintained to the end.

The Mid-Surrey Law Society

THE first annual report by the President and Secretary of the Mid-Surrey Law Society for the year ended 31st July, 1948-49, was presented to the annual general meeting of the members on 26th October, 1949. It states that the need for the society is shown by the fact that there were present at the founders' meeting, fifty seven, and the present membership is 109. The society is a member of the Associated Provincial Law Societies, and has worked in close co-operation with the association and supported various proposals to The Law Society. It has itself made representations objecting to the removal of the Land Registry to Durham. The Surrey County Council has supported the objection. At the request of the Secretary of the Kingston Group Hospital Management Committee, a panel of solicitors in the areas covered by the committee was prepared and submitted, for production to patients needing legal advice. The society also made representations to The Law Society with regard to the question of war damage, and the importance of ascertaining that, where there had been more than one incident affecting the property, a separate claim had been made for each. The Law Society, in consequence of this, inserted a notice in the *Gazette*, warning the profession of the position. The report shows that the society is already very active and thriving. May it grow from strength to strength.

Clearing of War-Damaged Sites

THE object of the War Damaged Sites Bill, 1949, which received its second reading in the Commons on 8th November, is to enable local authorities temporarily to take over war-damaged sites in order to cover up the scars of war during the period which must elapse before full development. Where war damage either wholly or partly not made good causes land to be in a condition "detrimental to the amenities of the neighbourhood," the local authority will be able, under the Bill, to take a lease of the land by agreement for any term not exceeding five years or may be authorised by the Minister to take possession compulsorily for a term not exceeding five years. At the end of the period the lease or period of compulsory possession may be renewed. No authority to take compulsory possession can be given where it appears that a person with an interest in the land will carry out, within a reasonable time, any works necessary to secure that the land is put into a condition which is not detrimental to the amenities of the neighbourhood. If during the period of possession by a local authority it appears that a person interested in the land has obtained planning permission to develop it and will proceed to develop without delay, the Minister must fix a date for the termination of the local authority's occupation. The local authority may either carry out works on the land or let the land for any term not exceeding the period for which the authority is entitled to possession of the land. The local authority is also given power to enter and execute works on twenty-four hours' notice to the occupier where it is unnecessary or inexpedient to take a lease or to take possession.

Compensation Provisions

THE use of land under the War Damaged Sites Bill is to be lawful notwithstanding any easement over the land or any right restrictive of the user of the land. But where the value of an interest in adjoining land is depreciated, or any person suffers damage by being disturbed in his enjoyment of such land in consequence of use of the land under the statute, he may recover compensation from the local authority if the act or omission causing the depreciation or disturbance would have been actionable at his suit if it had been done or omitted otherwise than in the exercise of statutory powers. Compensation for compulsorily taking or retaining possession will be payable on the same basis as under s. 2 of the Compensation (Defence) Act, 1939. Where a local authority enters upon land to execute works without taking possession or taking a lease, any person interested in the land may recover from the local authority compensation in respect of any depreciation in the value of his interest attributable to any damage occasioned by the exercise of the powers and in respect of any disturbance of his enjoyment so occasioned. Disputes as to compensation are to be determined by the General Claims Tribunal. Where the appropriate war-damage payment would be on a cost of works basis, the War Damage Commission may nevertheless decide to make a value payment if, although a licence to execute the work has been or will be granted, it appears, after consultation with all owners of proprietary interests and mortgagees, that the work will not be carried out within a reasonable time.

Public Utility Undertakings: War Damage Claims

ON 4th November, 1949, the War Damage (Remitted Claims) Regulations, 1949 (S.I. 1949 No. 2019), came into operation. They set out the procedure for the notification of and the submission of claims for war damage to their land and buildings by undertakings which are now to be dealt with under the War Damage Act, 1943, in accordance with ss. 9 and 17 of the War Damage (Public Utility Undertakings, etc.) Act, 1949. Under the regulations notification of intention to make a claim must be given within six months from 4th November or within thirty days of any war damage. Any notification already made to any Government department is regarded as complying with this requirement. Claims for cost of works or temporary works payments must be made within thirty days of the receipt of a claim form from the War Damage Commission or thirty days after the completion of the form, whichever is the later. Claims for value payments are to be made within six months of the receipt of a claim form from the Commission. Similar periods are provided for the submission of claims in the special classes of case arising under Sched. III to the War Damage (Public Utility Undertakings, etc.) Act, 1949, where the payment under the Act to a public utility undertaking has not covered the loss incurred by other interests in the damaged buildings. The regulations set out the particulars which must be supplied to the Commission in the different classes of case.

Recent Decisions

In *Old Gate Estates, Ltd.* v. *Alexander*, on 31st October, the Court of Appeal (BUCKNILL, DENNING and SOMERVELL, L.JJ.) held that where a statutory tenant left his wife, wrote to his landlords that he was giving up his tenancy of the flat where he had lived with his wife, and later, at the request of the landlords' solicitors, wrote revoking his wife's licence to live in the flat, but left his wife and furniture in the flat, and some four months after he had left his wife and a few days after being served with a summons for possession returned to the flat and resumed married life with his wife, he had not in fact given up occupation of the flat so as to lose his statutory right of protection against eviction under the Rent Restrictions Acts.

In a case in the Divisional Court (the PRESIDENT and ORMEROD, J.), on 31st October (*The Times*, 1st November), attention was drawn to the importance of strict observance by magistrates' courts of ss. 4 and 5 of the Summary Procedure (Domestic Proceedings) Act, 1937, concerning the furnishing of information by a probation officer to the court.

In *R.* v. *Murphy* the Court of Criminal Appeal (the LORD CHIEF JUSTICE and HILBERY and CROOM-JOHNSON, JJ.), on 31st October (*The Times*, 1st November), held that a previous conviction in Northern Ireland was not a conviction within s. 23 (1) of the Criminal Justice Act, 1948, for the purpose of qualifying a prisoner for a sentence of corrective training or preventive detention.

A Divisional Court (the PRESIDENT and ORMEROD, J.), on 1st November (*The Times*, 2nd November), held that where a husband after a reconciliation, one condition of which was that normal sexual relations should be resumed, persistently refused to have sexual relations with his wife, who greatly desired to have a child, and she left him in consequence of that refusal, he was guilty of constructive desertion.

MISSING AND DEFECTIVE COAL-PLATES

THE debates in Parliament on the new Housing Act and its provision of "improvement grants" for elderly properties made it clear that we can expect that the type of house whose coal supply is delivered through a hole in the pavement is likely to be with us for several generations to come. This particular piece of the domestic machine has not only provided "copy" to the writers of juvenile fiction for many years, but has also been the source of much litigation, and it will perhaps be useful to have a résumé of the law, statutory and common, in connection therewith.

Provision is made in the Towns Improvement Clauses Act, 1847, s. 73, that: "When any opening is made in any pavement or footpath . . . as an entrance to any vault or cellar, a door or covering shall be made by the occupier of such vault or cellar . . . and such covering shall from time to time be kept in good repair by the occupier of such vault or cellar . . . and if such occupier do not within a reasonable time make such door or covering, or if he do not keep the same when properly made in good repair, he shall for every offence be liable to a penalty not exceeding £5." This section is incorporated in the Public Health Act, 1875, by virtue of s. 160 of that Act, and therefore applies to all urban districts and to such rural districts as the Minister of Health may have ordered under s. 276 of the 1875 Act. The penalty is recoverable summarily either by the "person aggrieved" or by the local authority of the district in which the offence was committed (ss. 252–3, Public Health Act, 1875).

Furthermore, by the Public Health Acts Amendment Act, 1890, s. 35, ". . . all openings into . . . vaults or cellars in the surface of any street, and all cellar-heads, gratings, lights and coal-holes in the surface of any street shall be kept in good repair by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong," failing which the local authority may, on twenty-four hours' notice, remedy the default and recover the expenses "in a summary manner."

Another useful provision which is incorporated in the Public Health Act, 1875, is s. 28 of the Town Police Clauses Act, 1847, which enacts that: "Every person who in any street, to the obstruction, annoyance or danger of the residents or passengers, commits any of the following offences shall be liable to a penalty not exceeding forty shillings for each offence, or, in the discretion of the justices before whom he is convicted, may be committed to prison there to remain for a period not exceeding fourteen days . . . (that is to say): Every person who leaves open any vault or cellar, or the entrance from any street to any cellar or room underground, without sufficient fence or handrail or leaves defective the door, window or other covering of any vault or cellar . . ."

A missing or defective coal-plate would also be a "statutory nuisance" within s. 92 of the Public Health Act, 1936, since the premises would be "in such a state as to be prejudicial to health or a nuisance." As such defect is "of a structural character," an abatement notice can probably only be served on the "owner" (s. 93 (*a*)), but it is to be remembered that in the Public Health Act "owner" includes the person who receives the rents. If the abatement notice issued by the local authority is not obeyed, complaint can be laid before the justices who may make a nuisance order requiring compliance and also impose a fine not exceeding five pounds.

Turning to the question of civil liability in damages to a person injured as a result of a coal-plate being removed or being defective, a question which may first present itself is this: is the occupier or the highway authority responsible? In the case of *movable* gratings, such as coal-plates, the occupier is responsible for repair and is liable for any consequences due to neglect thereof (*Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401). The position is different in the case of fixed gratings in pavements: in such cases the grating becomes part of the highway and, if the highway has been dedicated, responsibility falls upon the highway authority (Clerk and Lindsell on Torts, 10th ed., p. 579). An unusual set of facts occurred in *Horridge* v. *Makinson* (1915), 79 J.P. 484, where the coal-hole was in the side of the house. In making up the pavement the local authority had left a space unpaved (and uncovered by any grating) so that a wooden flap could be lifted up. On appeal from Wigan County Court Bailhache, J., said: "There is no duty on a frontager to repair a highway which vests in and is under the control of a local authority . . . Where the nuisance, therefore, is in the highway itself . . . there is no obligation on the frontager to repair, and no liability on him to compensate any person who is injured by reason of any defect in the highway itself." It is clear, however, that liability for the ordinary coal-plate vests in the occupier and not in the highway authority.

Is it the tenant or the landlord who is liable? In *Pretty* v. *Bickmore, supra*, the premises were let to a tenant who had covenanted to keep the premises in repair and the defendant, the landlord, had promised to put them into repair and his workmen were actually in the premises at the time the plaintiff stepped on the plate, which gave way. It was held by three judges, on appeal, that the tenant, having agreed to keep the premises in repair, was liable. Bovill, C.J., said: "In all the cases where the landlord has been held to be responsible, it will be found that he has done some act authorising the continuance of the dangerous state of the premises . . . the defendant let the premises to a tenant who covenanted to maintain and keep them in repair. Under these circumstances, how can it be said that the defendant authorised the thing to be kept in a dangerous state?" Honeyman, J., however, said: "If the tenant be under no obligation to repair, the landlord may be liable: but, if the tenant undertakes to keep the premises in repair, he thereby relieves the landlord from responsibility." And in *Payne* v. *Rogers* (1794), 3 R.R. 415, it was held, *per* Buller, J., ". . . the tenant as occupier is *prima facie* liable . . . But if he can show that the landlord is to repair, the landlord is liable for neglect to repair."

Where neither landlord nor tenant has agreed to repair, it has recently been affirmed in *Berman* v. *Ward and Others* (*Estates Gazette*, 11th July, 1949, at p. 487) that the right person to sue is the occupier. It was agreed against the landlords that a cellar under the pavement was in their "occupation and control," though they permitted the tenant, the first defendant, to use it for the purpose of storing coal. Alternative grounds upon which it was sought to make them liable were that the nuisance existed at the time of the letting (1947), and that the action arose from lack of repair of premises adjoining the highway. In fact the judge found that there was no proof of disrepair and "He had no doubt the explanation was that coal merchants had been recently delivering coal and someone employed by them had been careless in putting back the plate." He would have awarded damages against Mr. Ward, the tenant, but the latter had claimed diplomatic immunity.

Even though there is no agreement as to responsibility for repairs, the landlord will be liable if he can be shown to have known and acquiesced in the existence of a defective plate. Thus, in *France* v. *Alker* (1936), *Estates Gazette Digest* 213, there was evidence that a previous accident had been reported to the owner's husband, who managed the property, and Swift, J., in consequence, held her liable. And if the landlord re-lets premises knowing that the defect exists he thereby authorises it and makes himself liable (*Sandford* v. *Clarke* (1888), 21 Q.B.D. 398), but there is not such a re-letting at the end of each week of a weekly tenancy, for such a tenancy requires a week's notice to terminate it (*Bowen* v. *Anderson* [1894] 1 Q.B. 164).

To succeed, the plaintiff must, of course, have been making a proper use of the highway, i.e., to pass and re-pass, but he is entitled, e.g., to stay and talk to an acquaintance on the highway, and if he happens to stand upon a grid or plate which gives way, he is entitled to recover (*Gwinnell* v. *Eamer* (1875), L.R. 10 C.P. 658).

If the accident is due to a coal merchant failing to replace the plate securely, the occupier is nevertheless *prima facie* liable (*Berman* v. *Ward and Others, supra*). The same rule applies if a pedestrian falls into an unguarded coal-hole whilst the coal merchant is actually in process of supplying the coal (*Pickard* v. *Smith* (1861), 10 C.B. (N.S.) 470). On the question of liability for the acts of an independent contractor Williams, J., said: "The defendant is not absolved by the fact of the coal merchant being employed, and of the injury being the consequence of his immediate act . . . if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable . . . That rule is inapplicable, however, to cases in which the act which occasions the injury is one which the contractor was employed to do . . . Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant, and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having entrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law."

The occupier is, however, entitled to contribution as against a negligent coal merchant, and the amount was fixed at nine-tenths in *Daniel* v. *Rickett, Cockerell and Co., Ltd., and Raymond* [1938] 2 K.B. 322. The occupier had directed the carman to remove the plate, and a lady, her view obscured by an umbrella, fell into the hole. In a lengthy judgment, Hilbery, J., said that under s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, he had to decide what contribution was "just and equitable" from any person "having regard to that person's responsibility." He continued: "I doubt whether any householder whatever would dream of going out to see whether the coal merchant's man took the precaution to safeguard foot passengers coming along the road . . . However, whether he would think so or not, the fact remains that in law, as he has contracted for something to be done on the highway which must create a dangerous situation unless precautions are taken, he is under a liability to see that such precautions are taken as are reasonable for the safeguarding of foot passengers. However often he, like many others, may neglect to do that, the fact remains that he has some responsibility for seeing that some sort of precautions are taken . . . I cannot think, however, that the degree of responsibility in those circumstances would be other than a small one."

Whiteley v. *Pepper and Wife* (1876), 2 Q.B.D. 276, shows that the plaintiff can choose whether he will go against the coal merchant or the occupier. As the occupier may be able to plead liability in the lessor to repair, it would appear preferable to proceed against the coal merchant, or against them both. In that case it was unsuccessfully contended that the merchant had no interest in the way the coals were delivered: the plate was removed for the customer's benefit or convenience and hence all liability lay on him. "I cannot agree with that contention," said Mellor, J. "It may be that in this case an action would lie against the occupier of the premises, but it is clear to my mind that an action lies against the defendant for the negligence of his servants."

What is the occupier's liability for the wanton interference with his coal-plate by small boys? In *Braithwaite* v. *Watson* (1889), 5 T.L.R. 331, it was urged for the defence that "a little boy who was in the house had, boy like, got into the cellar and poking about with his stick disturbed the plate so that it slipped aside when trodden on." Manisty, J., however, was unmoved, and held the tenant liable though "he thought it was too bad to bring such a case in this court . . . it should have been brought in the county court," and awarded £9 damages without costs for a grazed leg and "loss of business for a month." This particular coal-plate was in Piccadilly, London. It would seem, therefore, that the occupier should ensure that his coal-plate is so firmly fixed that it cannot be interfered with by small boys, whether from within or without.

G. H. C. V.

Costs

CONVEYANCING SCALES: WHEN APPLICABLE—III

WE now come to the scale charge which may be made by the vendor's solicitors for "deducing title to freehold, copyhold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)". This seems reasonably clear, but it is as well to emphasise a point brought out by Fry, L.J., in the case of *Re Lacey & Son* (1883), 25 Ch. D. 301, namely, that the scale provides for the work in connection with four stages in the purchase of property. The solicitors must (*a*) deduce the title; (*b*) peruse the conveyance; (*c*) complete the conveyance; and (*d*) prepare the contract or conditions of sale, if any. The significance of these four stages must be noticed. There is no necessity, so far as entitlement to the scale charge is concerned, for there to be any contract or conditions of sale at all, and if these are dispensed with for any reason the solicitor is still entitled to the scale remuneration provided he completely performs the work involved in the other three stages.

The performance of the work in connection with these other three stages is essential in order to found entitlement to the scale remuneration, and if one of them is dispensed with, as in *Re Lacey & Son, supra*, where the purchasers intimated that they did not wish the title deduced, then the scale fee is not applicable.

Not much difficulty will be experienced in calculating the scale fee on a straightforward sale of property. Where property is sold by auction then the deducing fee will be charged on each lot of property, but where property is divided into lots for the convenience of sale, the whole of the property being held under a single conveyance, and one purchaser acquires several lots, and takes one conveyance only, and only one abstract is delivered, then the scale fee will be charged only on the aggregate price of the lots (see r. 1 of the rules applicable to Sched. I, Pt. 1).

Rule 9 of these rules will produce somewhat surprising results at times. This rule states that where property is sold subject to incumbrances, then, except where the mortgagee is the purchaser, the scale fee shall be charged as if the incumbrances were part of the purchase price. Thus, if a property which is the subject of a first mortgage for £10,000 is sold by the second mortgagee for, say, £1,000 subject to the first mortgage, then the second mortgagee's solicitor's charge will be based on a purchase price, not of £1,000, but of £1,000 plus £10,000, or £11,000.

Where a solicitor peruses a draft on behalf of several parties having distinct interests, proper to be separately represented, he is entitled to charge £2 (plus 50 per cent., of course, in respect of work undertaken after 1st March, 1944) additional for each party after the first. Thus, if he acts for the vendor of property which is subject to a mortgage, he would be entitled to this additional charge if he also acted for the mortgagee who also joined in the conveyance; also where he acts for the tenant for life who is selling and for an annuitant who joins in the conveyance to release the annuity.

If on the other hand the third party is separately represented, then the solicitor acting for that third party will be entitled to his proper charges under Sched. II (see r. 5 of the rules to Sched. I, Pt. 1). Moreover, in such a case it would seem not unreasonable that the vendor's solicitor should be entitled to his proper charges under Sched. II for communicating with the solicitor for the third party, in addition to his scale fee for deducing title.

The question frequently arises whether a solicitor who has acted for the purchaser of property, in respect of which he has received his scale fee, is entitled to the full scale remuneration for deducing title in the event of a subsequent sale of the same property shortly after its acquisition. The answer is in the affirmative. There is nothing in the rules which precludes the full scale fee being charged in such circumstances, although the solicitor's work may be much lightened by reason of the fact that he had shortly before acted in the purchase of the property. Whether, as a matter of policy, he would feel inclined to charge something less than the scale fee in the circumstances is, of course, another matter, but he is strictly entitled to the full scale charge both on the purchase and again on the sale.

The scale fee is intended to cover all work done in deducing the title and perusing and completing the conveyance, although it is evident that the volume of work involved may vary considerably as between different cases. Nevertheless, there can be no additional charge over and above the scale fee where the work involved turns out to be greater than was anticipated or greater than normal. Thus, it may very well be that in the course of deducing the title the vendor's solicitor will have to attend at a mortgagee's solicitor's office to inspect the deeds, and may even have to make a journey for this purpose, involving a considerable expenditure of time. He can charge nothing more for this since the deducing scale covers *all* work done by the vendor's solicitor in deducing the title. He can, of course, charge in addition to the scale fee his reasonable and proper disbursements, and in circumstances such as these it is considered that he would be justified in charging an agent's fee for attending and inspecting the deeds in the mortgagee's hands, where he chooses to employ an agent rather than attend himself, provided the agent's fees do not exceed the amount of the normal travelling expenses.

Similarly, where the solicitor deems it expedient to take counsel's advice, say in connection with the conveyance, and obtains the vendor's authority to do so, he may charge the counsel's fee as a proper disbursement, but he cannot charge anything over and above the scale fee for drawing the instructions to counsel to advise.

A point of difficulty sometimes arises when properties are exchanged with or without any balance of cash being handed over. In these cases one must bear in mind the guiding principle that (*a*) there must be a specific capital amount on which the scale fee can be calculated, and (*b*) the solicitor acting must have done substantially the whole of the work covered by the scale fee. If, therefore, two properties are exchanged, the consideration for the transfer of one being the transfer of the other, and there is no clear and authoritative evidence of the value of the properties, then the solicitor must charge under Sched. II. If, on the other hand, two properties are exchanged and there is a clear indication of the values, *and* the exchange is effected by two deeds, then the solicitor acting would be entitled to his scale fees under Sched. I, Pt. 1, for deducing and investigating.

On the other hand, if the exchange was effected by only one deed, then Sched. I, Pt. 1, would be inapplicable, for we have observed that the deducing fee only applies where a conveyance is perused and completed, and the investigating fee applies only where, *inter alia*, a conveyance is prepared and completed, and it is manifest that the same solicitor could not both prepare the deed and peruse it as well.

The scale fee is intended, as we have seen, to cover all the work involved in deducing the title, and this will include attending on the mortgagee's solicitors to inspect the deeds in their possession, but it does not cover the work involved in, say, paying off a mortgage. For the latter work the solicitor may charge under Sched. II in addition to the deducing scale fee.

Rule 12 of the rules applicable to Sched. I, Pt. 1, provides an interesting and little-used alternative to charging the scale conducting or negotiating fee. The rule provides that where a solicitor is entitled to charge the scale fee for negotiating or for conducting a sale by auction, but does not do so, then he may charge for investigating or deducing at the rate of 30s. per cent. on amounts up to £2,000, with an addition of 20s. per cent. on amounts over £2,000 and under £5,000, and 10s. per cent. on amounts over £5,000 and up to £50,000. These rates are, of course, increased by 50 per cent. in respect of work undertaken after 1st March, 1944.

It will be noticed that the rule provides for these increased deducing or investigating fees at the discretion of the solicitor only in those cases where the solicitor is *entitled* either to the negotiating or the conducting scale fee, and it is a little difficult to appreciate in what circumstances the solicitor would desire to avail himself of this alternative, for it will be found that the r. 12 scale fee is less than the total of the negotiating or conducting scale fee added to the normal deducing fee.

It must be emphasised in conclusion that the deducing scale fee is applicable only to the sale of " freehold, copyhold or leasehold " property. Thus, a solicitor might successfully negotiate the sale of goodwill, for which he would be entitled, as we have observed in a former article, to the scale negotiating fee under Sched. I, Pt. 1, but he would have to render an item bill under Sched. II in respect of the assignment of the goodwill.

We will consider in our next article the remaining scale fees under Sched. I, Pt. 1.

J. L. R. R.

Company Law and Practice

ESTATE DUTY IN RELATION TO GIFTS OF SHARES

METHODS of constituting a gift of shares were considered in a previous article (*ante*, p. 657) and it is desirable also to consider the estate duty position in relation to such a gift.

The law on the subject is substantially contained in s. 2 (1) (*c*) of the Finance Act, 1894, s. 38 (2) (*a*) of the Customs and Inland Revenue Act, 1881 (as amended by s. 11 (1) of the Customs and Inland Revenue Act, 1889, s. 59 (1) of the Finance (1909–10) Act, 1910, and s. 47 and Sched. XI, Pt. I, para. 1, of the Finance Act, 1946), and s. 33 of the Finance Act, 1949, and can be summarised by saying that upon the death of the donor estate duty is payable in respect of the subject-matter of a gift *inter vivos* :—

(*a*) Where the gift was made within five years of the death, unless—

(i) the gift was made for public or charitable purposes more than twelve months before the death ; or

(ii) the gift was made in consideration of marriage ; or

(iii) the gift is proved to the satisfaction of the Inland Revenue Commissioners to have been part of the normal expenditure of the donor and to have been reasonable, having regard to the size of his income and other circumstances ; or

(iv) the aggregate amount or value of all gifts to the one donee within the five-year period did not exceed £100 ; or

(v) the aggregate amount or value of all gifts to the one donee within the five-year period did not exceed £500 and the conditions specified in s. 33 of the Finance Act, 1949, are satisfied.

(*b*) Where *bona fide* possession of the subject-matter of the gift was not taken immediately (or outside the five-year period) and thenceforth retained to the entire exclusion of the donor.

There are, of course, a number of particular exceptions to the above, but it can be said that in the normal way a gift of shares *inter vivos* will, if it is an out-and-out gift without reservation or power of revocation, give rise to a claim for estate duty in the event of the death of the donor within five years of the gift but not otherwise. If some reservation is made or power of revocation is retained, the subject-matter

of the gift, whenever made, may be liable in whole or in part to estate duty.

Where a gift of shares is made by declaration of trust it seems that it would not be held that *bona fide* possession had not been taken and retained to the entire exclusion of the donor merely because the donor remained the registered holder of the shares and was, therefore, entitled to receive notices of and to attend and vote at general meetings. The test is whether or not the beneficial interest has passed to the donee to the entire exclusion of the donor (*Stamp Duty Commissioners for New South Wales* v. *Perpetual Trustee Co.* [1943] A.C. 425). Unless there is some enforceable contract or reservation in favour of the donor which would prevent the donee from requiring the donor to exercise voting and other rights in accordance with his directions or to transfer the shares to him or as he might direct, the fact that the donee permits the donor to remain registered will not apparently affect the absolute character of the gift (*Att.-Gen.* v. *Seccombe* [1911] 2 K.B. 688) except possibly in extreme cases where, despite the lack of proof of any enforceable contract or reservation the gift "reeks of benefits reserved to the donor" (see *Earl Grey* v. *Att.-Gen.* [1900] A.C. 124).

Where a gift of shares is made by way of transfer to the donee or to third parties as trustees for the donee no such difficulty as mentioned above needs to be considered. As a matter of practice it is always wiser (unless inconsistent with intention) to constitute a gift or settlement by vesting the legal control and the discretionary powers (if any) exercisable in respect of the subject-matter of the gift or settlement in some person or persons other than the donor or settlor, since the estate duty position is thereby much more clear.

Under s. 7 (5) of the Finance Act, 1894, estate duty is assessed upon the value at the date of death rather than at the date of the gift. If a gift of shares is made by way of settlement and the settlement is still operative at the date of death, the property to be valued is the settled fund as existing at the date of death (*Re Payne; Poplett* v. *Att.-Gen.* [1940] Ch. 576); but, if the gift is an out-and-out gift and the shares remain in the hands of the donee in the same form as at the date of the gift, the property to be valued is the shares given and nothing more (*Att.-Gen.* v. *Oldham* [1940] 2 K.B. 485). The result of the cases quoted is that where a bonus issue is made after the date of the gift the bonus shares added to the original holding would have to be brought into account as part of the settled fund in the case of a gift by way of settlement but would be disregarded in the case of an out-and-out gift. In view of the recent prevalence of bonus issues one cannot but surmise that the Inland Revenue have lost or stand to lose quite a lot of estate duty, where out-and-out gifts have been made before the issue, since the effect of a bonus issue must be to reduce the value of the original holding as such. In such a case estate duty may be saved both for the donee and for the donor's estate, the reduction in value of the original holding affecting the donee directly and the donor's estate by reason of the fact that aggregation applies and the reduction in value of the holding may reduce the rate at which duty is payable on the rest of the estate.

It does not appear, in view of the reasoning upon which the case of *Att.-Gen.* v. *Oldham* is based, that it makes any difference either that the gift is made immediately before and with knowledge of the intention to make a bonus issue or that the company making the bonus issue is controlled by the donor and the issue is made wholly or partly with the intention of reducing potential estate duty liability. There is no reason why a man should not so order his affairs as to minimise his potential estate duty liability, although, of course, a line must be drawn beyond which tax avoidance (which may be regarded as legitimate) becomes tax evasion (which is morally, if not legally, reprehensible). If some person should form a company, sell to it valuable property in exchange for shares of a small nominal value (i.e., at a large premium), make a gift of some of the shares and then cause to be declared a large bonus issue out of the share premium account, let us hope that the Inland Revenue would find some legal argument (possibly s. 46 of the Finance Act, 1940) which, without affecting the decision in *Att.-Gen.* v. *Oldham*, would nullify the intended effect of these artificial transactions. To carry out such transactions is both morally reprehensible and harmful to the public revenues (i.e., to each one of us as taxpayers) and it might result (as so often such cases do) in new legislation which would increase the estate duty burden in many cases just to catch the odd few where evasion has been practised.

Where the original holding no longer exists at the date of death in the form in which it was at the date of the gift the position is by no means clear, and there are many interesting and difficult points of law with regard to the identification of the holding with other property existing at the date of death, which can only be said to be undecided. If the original holding exists in the hands of the donee at the date of death and is (to quote *Oakes* v. *Oakes* (1852), 9 Hare 666) "changed in name and form only . . . yet substantially the same thing" it is suggested that the property in its changed form is that which has to be valued at the date of death. The case quoted and those mentioned below in this paragraph deal with a question of ademption, but it is suggested that the principles are applicable. In the case of *Re Leeming; Turner* v. *Leeming* [1912] 1 Ch. 828, a company reconstruction took place between the date of the will and the date of death and it was held that the shares in the new company given in exchange for those in the old company passed under a bequest of the shares in the old company. In the case of *Re O'Brien; Little* v. *O'Brien* (1946), 115 L.J. Ch. 340, the shares concerned were converted from ordinary shares, part into preferred ordinary shares and part into deferred ordinary shares, between the date of the will and the date of death and it was held that the shares into which they were converted passed under a bequest of the ordinary shares; it was also held that bonus shares were not to be regarded as an addition to the original holding so as to pass under the bequest. The principles of the cases quoted seem to be based on sound common sense and could well be applied to the question of what property to value in the case of an out-and-out gift; so far as a gift by way of settlement is concerned, of course, the problem does not arise so long as the settlement is still operative at the date of death. Where a settlement comes to an end and the settled fund is distributed before the date of death the legal position is more than obscure, but it is suggested that the property taken by each beneficiary becomes *prima facie* the "property taken" as if it had been given to the beneficiary directly by the donor.

Where the property given is sold prior to the date of death, it is by no means clear whether the sale alters in any way the property to be valued. The case of *Strathcona (Lord)* v. *Inland Revenue* [1929] S.C. 800 is an authority for the proposition that the property given (if existing at the date of death) is the property to be valued whether or not it has been sold by the donee, but this case, which was applied in the case of *Att.-Gen. for Ontario* v. *National Trust Co.* [1931] A.C. 818, appears to be in conflict with certain of the judgments in *Re Payne* and *Att.-Gen.* v. *Oldham* as to the meaning of the phrase "property taken" in s. 38 (2) of the Customs and Inland Revenue Act, 1881. It would appear from these judgments that in the case of an out-and-out gift, having regard to s. 22 (1) (*f*) of the Finance Act, 1894, which defines property as including "real and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale," the proceeds of sale and any money or investment representing them at the date of death will be the "property taken," which is to be valued; this, however, is in direct conflict with the *Strathcona* case.

One thing at least is clear, and that is that the donor cannot at the time of a gift of anything other than cash have more than a rough idea of how the gift will affect his estate in the event of his death within the five-year period. If the desired effect of converting a gift of shares into a gift

of cash could be achieved by selling the shares to the donee for cash and then giving him that cash, some certainty could be obtained. It is doubtful, however, whether this method is effective, since a gift of cash to be applied in the purchase of property is regarded as being a gift of that property, and presumably a sale of property upon the footing that the vendor will make over the purchase consideration as a gift would be regarded in the same light. A gift of cash is normally regarded as having taken place where the donee has contracted to purchase property from a third party and the necessary cash is provided by the donor, but it seems that at the most this principle could only be applied to a sale by the donor when at the time of the agreement for sale no arrangements had been made for a gift of the purchase money.

As can be seen from the above there is a wide field over which legal decision is lacking or is contradictory. Nothing but legislation can satisfactorily clarify the position. It is, no doubt, due to the good sense of the Estate Duty Office in dealing with particular cases that there have been relatively few cases in the courts, but it seems unreasonable that an intending donor should have no clear guide as to the position of his estate in the event of his death within the five-year period after making a gift, and in view of this it is, in a way, unfortunate that there has been so little litigation. But legislation, rather than litigation, is the true answer to the problem.

J. W. M.

A Conveyancer's Diary

THE LANDS TRIBUNAL

THE Lands Tribunal Act, 1949, received the Royal Assent on the 14th July, but ss. 1 to 4 of the Act will not come into force until a day to be appointed by Order in Council for the purpose, and so far no order has been made to this effect. These are the sections giving the Lands Tribunal, which is set up by the Act, jurisdiction to determine the matters which are now or may in the future be assigned to it, so that the passage of this Act has so far been without practical effect; but doubtless the interval before a day is appointed for bringing the main provisions of this measure into operation will not be long, and it affords an opportunity of examining some portions of the Act at leisure.

The principal business of the Lands Tribunal set up by s. 1 of the Act will be to determine questions of compensation which in the past have been referred to the panel of official arbitrators appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, and similar problems under analogous Acts, e.g., the Lands Clauses Acts and the Town and Country Planning Act, 1947 (*ante*, p. 621). The effect of the Act on the determination of such questions is a matter for the experts in those branches of the law, but the Act contains one provision which is of direct interest to the conveyancer. This is s. 1 (4), which provides for the exercise by the tribunal of the jurisdiction conferred upon the authority by s. 84 of the Law of Property Act, 1925, to discharge or modify restrictions on the use of land or buildings on land. By s. 84 (10) of the last-mentioned Act the authority for this purpose was defined as one or more of the official arbitrators appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, as might be selected by the Reference Committee under that Act. In the future the authority will be the Lands Tribunal, and as the terms for the composition of the tribunal contained in s. 2 of the present Act provide that its members (apart from the president) shall be either barristers or solicitors of seven years' standing, or persons experienced in valuation, to be appointed after consultation with the Royal Institution of Chartered Surveyors, it is to be hoped that the arbitrators who up till now have discharged the function of determining applications under s. 84 will be appointed to the new tribunal, and that the benefit of their experience in matters relating to restrictive covenants will not be lost.

With one exception, the practice under s. 84 will not be affected by the new Act. The jurisdiction of the tribunal may be exercised by either one or more of its members (s. 3 (1)) to be selected by the president on certain principles set out in s. 3 (2). It is expressly provided by s. 7 (1) that the transfer of any jurisdiction to the tribunal is not to affect the principles on which any question is to be determined, or the persons on whom the determination is binding. These provisions make it clear that, for the purposes of s. 84 at least (and this would appear to be broadly true of the other matters transferred to the jurisdiction of the tribunal as well), the Act simply replaces part of the old machinery with new; it makes no radical change, with the one exception already referred to, in the machinery itself.

This exception is the provision contained in s. 3 (4) of the Act to the effect that a decision of the Lands Tribunal shall be final, subject only to the right of appeal there specified.

This provision should be compared with the terminology used in s. 84. That section provides (by subs. (1)) that the authority shall have power, on application made to it, by order wholly or partially to discharge the restrictions therein referred to, on being satisfied of certain matters there specified. Subsection (3) provides that before any such order is made the authority is to direct such inquiries to be made and such notices to be given as the authority may think fit, and finally (subs. (5)) any order made under the section is to be binding on certain persons, whether parties to the proceedings or not, " but any order made by the authority shall, in accordance with rules of court, be subject to appeal to the court." (The part of subs. (5) here quoted verbatim has been repealed by the Act of 1949, s. 10 (4).)

Now in *Re* 108 *Lancaster Gate* [1933] Ch. 419, it was held that a dismissal by the official arbitrator of an application for the discharge or modification of a restriction affecting land under s. 84 was not an " order made by the authority " within the meaning of subs. (5) of that section, and that in consequence the disappointed party had no right of appeal to the Chancery Division under the appropriate rules of court against such dismissal. In coming to this conclusion Clauson, J., obtained some guidance from subs. (1), which in his judgment showed that the " order made by the authority " referred to in subs. (5) must be an order wholly or partially discharging or modifying a restriction. " The order made . . . does not wholly or partially discharge or modify a restriction . . . In my view, on the construction of the section there is no right of appeal against a refusal to make an order; there is only a right to appeal against such order as the authority makes " (*Re* 108 *Lancaster Gate*, *supra*, at p. 425). The correctness of this decision has never been challenged.

The Act of 1949 uses different language in declaring, by s. 3 (4), that a decision of the Lands Tribunal shall be final, provided that any person who is aggrieved by the decision as being erroneous in point of law may require the tribunal to state a case for the decision of the court. *Prima facie* a decision of the tribunal, for the purposes of s. 84, would appear to include a decision to dismiss the application made to it under that section, and the *ratio decidendi* founding the judgment in *Re* 108 *Lancaster Gate*, which has been summarised above, does not apply to a decision made by a tribunal under the new Act: s. 84 (1) of the Law of Property Act, 1925, does not speak of " decisions." A decision of the tribunal dismissing an application may, then, form the subject of a case stated.

But even assuming that a change of this kind has been brought about by the Act of 1949 in connection with applications under s. 84, the extent of the change, for practical purposes, is unlikely to be as considerable as at first sight appears. The procedure by case stated will be available only if the tribunal misdirects itself on a point of law, and

most unsuccessful applications under s. 84 fail because the applicant is unable to show to the satisfaction of the tribunal that restrictions which were once effective for their purpose are so no longer. The questions involved in such cases are usually questions of fact; and in that event there can be no appeal by way of case stated whatever the decision of the tribunal. But some nice questions will, nevertheless, arise. For example, one ground upon which the tribunal may authorise the discharge or modification of a restrictive covenant is that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. The question of injury is one of fact, but before that can be determined the persons entitled to the benefit of the restriction must be ascertained, and that question may well involve questions of law. More will be heard of these new provisions before long.

One more interesting point on the new Act, although one of evanescent importance, is the effect of the repeal of that part of s. 84 (5) of the Law of Property Act, 1925, which gave the modified right of appeal to which reference has been made. This repeal took effect on the date on which the Act of 1949 came into force, i.e., the 14th July last (see s. 10 (4)): the substituted right of appeal by way of case stated is contained in a portion of the Act which, as already stated, will not come into force until a day is appointed for that purpose. The result is bizarre but not, I think, in doubt; an *interregnum* has been created during which there is no appeal of any kind from a determination under s. 84.

"A B C"

Landlord and Tenant Notebook

ALTERNATIVE ACCOMMODATION

I. The Tenant's Needs

The availability of alternative accommodation is always an attractive "ground for possession" in claims for recovery of controlled premises; no balance sheet showing hardship has to be drawn up, and the position is unlikely to undergo modification between the date of issue of plaint and the date of hearing. Also, there is authority for the proposition that the overriding requirement of reasonableness is less likely to defeat the claim than it is in cases in which one of the grounds in the Schedule to the 1933 Act is invoked (*Cumming* v. *Danson* (1942), 112 L.J.K.B. 145). Nevertheless, when, as is usually the case, no certificate of the local housing authority can be produced, an examination of s. 3 (3) of the statute in question shows that there may be a number of defences open to the tenant. For, apart from security of tenure requirements, the accommodation must "be reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either (i) similar as regards rental and extent to the accommodation afforded by dwelling-houses in the neighbourhood by any housing authority for persons whose needs, etc., are similar to those of the tenant and his family, or (ii) otherwise reasonably suitable to the means of the tenant and to the *needs of the tenant and his family* as regards extent and character." What may be covered by the expression "needs of the tenant," and what by the expression "and his family" have been the subject of two recent decisions, both published on the same day. The former question was examined in *De Markozoff* v. *Craig* (1949), 93 Sol. J. 693 (C.A.).

The facts of this case were that the tenant was a business man who was in the habit of promoting business by entertaining in his home on a large scale. He also had a small child. The landlord put forward, as suitable alternative accommodation, a dwelling where he would be unable to entertain and which lacked a garden where the child would be able to play: the premises claimed possessed such a garden. The county court judge held that the plaintiff had not satisfied the requirements.

At first sight it may well look as if the county court judge had ignored such authorities as *Middlesex County Council* v. *Hall* [1929] 2 K.B. 110, and *Briddon* v. *George* [1946] 1 All E.R. 609, on the entertainment facilities point, and *Warren* v. *Austen* [1947] 2 All E.R. 185 (C.A.), on the garden point.

For in *Middlesex County Council* v. *Hall* it was held that the fact that the tenant would be unable to conduct a tea-room in the premises offered did not avail him: accommodation for the purposes of habitation was all that mattered. In *Briddon* v. *George* the defendant, who owned a motor-car, objected in vain that the house offered had no garage. But the Court of Appeal, upholding the decision of the county court judge in *De Markozoff* v. *Craig*, did so by reasoning that entertaining business associates was, whatever the motive, a domestic activity. An activity, one might say, incidental to habitation; which cannot be said of the running of a tea-room or the keeping of a car (no matter how used). Moreover, it could no doubt be urged that while conceivably the tenant in *Middlesex County Council* v. *Hall* might find other premises which he could use as a tea-room, and the tenant in *Briddon* v. *George* a garage elsewhere, entertaining in restaurants is "not the same thing."

On the other point, Asquith, L.J., was at pains to emphasise, in *Warren* v. *Austen*, that a county court judge who considered that all he had to do was to compare the two sets of premises and if, on a comparison, the alternative accommodation were proved to be inferior, it followed that it was unsuitable, would be applying an entirely wrong criterion. The argument advanced for the tenant, or at all events the objection voiced by the tenant, in *De Markozoff* v. *Craig* does read as if it were based upon this fallacy: the house offered, it was said, lacked a garden in which his small child could play as it had been accustomed to doing. But in *Warren* v. *Austen* itself the absence of facilities of this kind was in fact held to be a legitimate consideration in deciding upon suitability; so the judgment of Sir Raymond Evershed, M.R., in the recent case, holding that the absence of a garden was something which the county court judge had been entitled to take into account, is not inconsistent with the older authority. Perhaps a captious critic might have something to say about what followed: " . . . seeing that the tenant's child would benefit by having a garden in which to play," which, taken by itself, does not appear to reflect the position; but one must read the judgment as a whole.

II. The Tenant's Family

The premises claimed in *Standingford* v. *Probert*, reported in *The Times* of 5th November, housed a widow, who was the tenant; her daughter, who was married but who had been deserted by her husband; and two of her sons and their wives. The accommodation tendered was found to be adequate for the needs of the tenant and the daughter, whom the deputy county court judge had counted in; but it would not take the sons and their wives. These, however, he considered to be outside the scope of the expression "and his family," and he therefore made the order sought. The Court of Appeal has thought otherwise.

I do not myself think that this is one of the many occasions on which the Acts evidence slovenly draftsmanship; it seems quite in keeping with their object that each case should be considered on its own peculiar facts and merits. The paragraph has produced a number of authorities showing that a husband is a member of his wife's family, that brothers and sisters are to count as such members, etc.; but, substantially, it may be said that courts have declined to commit themselves to classification by reference to consanguinity, and the possibilities of including even illegitimate children have been mooted (see Denning, L.J.'s judgment in *Brock* v. *Wollams* (1949), 93 Sol. J. 319 (C.A.)).

But the interesting part of the recent case was that the arguments advanced for the landlord included a contention that, the sons being married, they could no longer be said to be part of the tenant's family: they had started families of their own, and the landlord was not obliged to provide for them, still less for their wives. The court may be said to have dealt with this point in the same way as it dealt with the entertainment point in *De Markozoff* v. *Craig*; in that case, as we have seen, it took the view that an activity could be a business activity and a domestic activity; in this case, it decided that a man did not cease to be a member of his mother's family though he had started another family of his own. Those who deal with the law affecting husband and wife and who have become cynical enough to think there was something in the schoolboy's howler "acrimony, sometimes called holy, is another name for marriage" will no doubt be able to recall instances in which one spouse has referred to relations of the other as "your family," with or without adjectives.

R. B.

HERE AND THERE

NO CHANGE FOR LIBEL

DESPITE the labours of Lord Porter's Commission on the law of defamation, and their matured and detailed recommendations; despite the observations of Slade, J., on the same subject, made in August to the London Rotary Club; despite a more recent plea, formulated to the Institute of Journalists by Sir Valentine Holmes (restored, happily, to health, though not to practice), for legislators to restore the law of libel to the bases of its first principles; despite these powerful stimuli—for the Commission's conclusions were long matured and, in their fighting days, no libel action was complete unless the name of Slade or Holmes, or both, figured in the list of counsel—it seems that nothing can be done about any improvements in the law within the span of the expectation of life of the present Government. The business of altering the foundations of our national economy and (I am sure we all hope) underpinning the structure has left the Legislature insufficient leisure to deal with a mere matter of words, however injurious. The House of Lords, however, in its judicial capacity, is in process of sweeping up one corner of the enormous area of defamation, having lately, for the space of over a fortnight, been engaged on the hearing of the arguments in the appeal of *Turner* v. *Metro Goldwyn Mayer Pictures, Ltd.*

FILMS AND THE CRITIC

THIS remarkable action, though so far it has attracted but little attention in the world of law reporting, certainly ranks as a *cause célèbre* in popular estimation. How could it fail to be so when it involves the great twin pillars of culture in the century of the Common Man—broadcasting and the cinematograph? Though the hearing before Hilbery, J., and a jury took place so long ago as July, 1947, you remember what it was all about. The plaintiff (*sub nom.* Miss E. Arnot Robertson) was wont to deliver critiques of recent films for the B.B.C. The defendants, dissatisfied with her treatment of some of their productions, decided to invite her to no more previews and wrote to the B.B.C. to notify them of the fact, adding that in their judgment the lady was "completely out of touch with the tastes and entertainment requirements of the picture going millions who are also radio listeners and her criticisms are on the whole unnecessarily harmful to the film industry." The jury, answering specific questions put to them by the learned judge, found, *inter alia*, malice on the part of the defendants and delivered a verdict awarding her substantial damages, for which judgment was entered. The case was then argued in the Court of Appeal when, by that time, the parties must have learnt that there are more talkies in the world than are dreamt of in Hollywood or Elstree, and there the plaintiff lost her damages, two Lords Justices favouring an out-and-out judgment for the defendants, one preferring an order for a new trial. All this caused a great stirring in the writing world and particularly in the world of criticism. Was the freedom of honest, fearless critics in danger? Or was it not? If a criticism was mordant, what were the limits of the right of the bitten to bite back? Nothing would do but the opinion of the highest tribunal of all. Funds were raised for the purpose of obtaining it and now all parties breathlessly await the words of the oracle, which it would be impertinence to attempt to anticipate, save to deduce, from echoes of the two weeks' combat before the Appellate Committee, that some fresh shafts of light are likely to be projected from above to illuminate the dark and difficult path trodden by judges when they have to instruct juries on the intricacies of evidence of malice. Of interest to lexicographers will be the view taken by their lordships whether "out of touch with" means "ignorant of" or "out of sympathy with." Weight will be given to their decision by the presence of Lord Porter himself in the chair.

SWELLING THE STATUTES

IF Parliament has left the law of libel where it found it (for procedural changes within the scope of Rules of Court to alter concern it not) there is as yet no evident intention to deflate the statute book or reduce it from its present dropsical condition to that relatively lean and meagre couple of hundred pages that the legal profession used formerly to find more than sufficient strain on its digestive powers. Of specifically legal concern are the Bills relating to justices of the peace, to the restraint on anticipation, and to the consolidation of two and a half centuries of election law. There is also another of those Law Reform (Miscellaneous Provisions) Bills. This one has had added to it in the Lords an amendment to repeal or abolish the rule in *Russell* v. *Russell* [1924] A.C. 687, which Lord Merriman welcomed, stigmatising the rule as "an incubus and a nuisance." The Lord Chancellor also regarded it as a nuisance and likewise rejoiced at its obsequies on the additional ground (a rather curious ground, it was thought by some) that it was laid down by a majority of one. In a sporting country a close finish has not hitherto been regarded as an unsatisfactory climax to a sporting event, nor has it hitherto minimised the weight of judicial decisions. A majority in the proportions of three to two would not in Parliament be regarded as excessively narrow, while, if I remember rightly, the great Reform Bill, turning point in Parliamentary history, was actually carried by a single vote. In *Russell* v. *Russell*, by the way, the majority consisted of Lords Birkenhead, Finlay and Dunedin. To which is objection taken?

RICHARD ROE.

OBITUARY

MR. H. BOOCOCK

Mr. Herbert Boocock, solicitor, of Halifax and Ilkley, died on 27th October, aged 72. He was a past president of the Halifax Law Society and was admitted in 1899.

Mr. E. G. BRETHERTON

Mr. E. G. Bretherton, solicitor, of Tunbridge Wells, who had been in practice there for over fifty years, died recently.

Mr. W. CULLIMORE

Mr. William Cullimore, solicitor, of Chester, died on 2nd November, aged 61. He was formerly under-sheriff of Cheshire and was admitted in 1913.

MR. PERCIVAL GILBERT

Mr. Percival Gilbert, LL.B., solicitor to the Sheffield and District Gas Company and recently appointed legal assistant to the East Midland Gas Board, died at Leicester on 20th October, aged 51. He was admitted in 1925.

MR. R. M. GRYLLS

Mr. R. M. Grylls, of Gomersal, near Leeds, and Cleckheaton, died recently at the age of 79. He had served on the West Riding County Council for 31 years and had been an alderman for 16 years. He was admitted in 1891.

Mr. G. W. HODGSON

Mr. George Wright Hodgson, retired solicitor, who formerly practised in London, died recently at Bagdale, Whitby, aged 74.

MR. FRANK H. KIDD

Mr. Frank H. Kidd, deputy magistrates' clerk at Tynemouth, died on 25th October, aged 62. He was admitted in 1909.

Mr. G. H. NEWBORN

Mr. George Hope Newborn, solicitor, of Epworth, died on 28th October, aged 84. Clerk to Epworth magistrates, he was admitted in 1886.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Covenant for Quiet Enjoyment and the Assertion of Title Paramount

Sir,—I have been reading with interest the articles of " A B C " on the subject of the case of *Dudley & District Benefit Building Society* v. *Emerson*, and I feel that he has not so far dealt with what is to my mind the fundamental difficulty of the solicitor on taking up a lease or an assignment of an existing lease. Cases must be occurring daily where a lessee takes up a lease of, say, business premises at a substantial premium and perhaps spends considerable sums of money on alterations and improvements to the premises.

It is generally quite impracticable to investigate all the superior titles, which may include a long lease going back perhaps ninety-nine years with several sub-leases granted out of it. In these cases, the case of *Dudley & District Benefit Building Society* v. *Emerson* emphasises that the lessee is at all times exposed to the risk of the assertion of a paramount title by any superior title holder.

I do not understand his reference (SOLICITORS' JOURNAL, 15th October, 1949, p. 643) to the covenant for quiet enjoyment, as this is almost invariably limited to the acts of the lessee or persons claiming by, through, under or in trust for him. Does " A B C " mean that the assertion of title paramount would be an infringement of the usual form of quiet enjoyment clause? Surely it could not be said that the superior title holder was claiming by, through, under or in trust for the lessor.

It may well be that the answer is that the solicitor acting for the lessee, if it is impracticable to investigate all the superior titles, must warn his client of the risks involved. This, of course, presents practical difficulties, and I should be glad of any observations you care to make on this letter.

T. S. PASCALL.

London, E.C.1.

[" A B C " writes :—

First, as to the covenant for quiet enjoyment—on reading my earlier observations I agree that they are too wide and may be misleading. I certainly did not mean to suggest that this covenant in its qualified form affords any protection to a lessee against eviction by title paramount : the covenant in this form is expressly framed to avoid this result. I had in mind the covenant implied when no covenant for quiet enjoyment is expressed, which would afford such protection, or so at least I think : there has been some judicial uncertainty on the point. Incidentally, the *assignee* of a lease is usually fully protected against the assertion of a title paramount by virtue of the covenants implied by s. 76 of the Law of Property Act, 1925.

As to the practical difficulties, these may be considerable in some cases, as this correspondent points out ; but in my opinion a purchaser of a lease or sub-lease at a premium runs just as much risk in not investigating the superior title, whatever that may be, as a purchaser of the freehold, and on such a purchase the right to investigate such title should be reserved under s. 44 (*a*) of the Law of Property Act, 1925. What investigations are then made must depend on the circumstances, but as far as the existence of a mortgage somewhere in the title is concerned, the ability to produce documents of title should usually be sufficient indication of the position. Where such investigations cannot be pursued far enough, as in the case put by this correspondent, an unqualified covenant for quiet enjoyment will afford protection, or, as is suggested, the risks should be pointed out to the purchaser. There is no easy way out of the difficulties involved in these cases, and I did not mean to suggest anything to the contrary ; but these difficulties are not new, as a careful reading of *Iron Trades, etc., Association* v. *Union Land, etc., Ltd.* [1937] Ch. 313, will show, and they should not be over-stressed.]

Divorce—Non-Cohabitation Clause

Sir,—Time and time again I have been consulted by persons who wish to take divorce proceedings, and they have obtained orders against their husbands on the ground that the husbands have neglected to maintain them, or in effect have deserted the parties in whose favour the orders were made, and it very often transpires that the non-cohabitation clause has been left in the orders. This of course destroys whatever desertion there may have been and divorce proceedings are not available.

I feel that the only way to remedy this paradoxical position is that all orders, which are usually printed, should omit the non-cohabitation clause. In many cases the non-cohabitation clause is inadvertently left in and thus causes great hardship to the person in whose favour it is made when that person seeks to take divorce proceedings.

In my humble submission it holds up the law to ridicule when the person obtains an order on the grounds of desertion and inadvertently the non-cohabitation clause is left in and then that destroys the efficacy of the order for the purpose of future proceedings.

It is very difficult for legal advisers to explain the position to the prospective petitioner, and one cannot wonder at this, particularly when the order says that the parties are separated because of desertion and then in the same breath takes away the penultimate effect of the order.

S. MICKLER.

Newcastle upon Tyne.

REVIEWS

A Guide to the Landlord and Tenant (Rent Control) Act, 1949. Current Law Guide, No. 7. By J. MUIR WATT, M.A., Barrister-at-Law. 1949. London : Sweet & Maxwell, Ltd. ; Stevens & Sons, Ltd. 6s. 6d. net.

There does not seem much sense in the *dictum* that a reviewer must find blemishes or go out of business, and in the case of this guide the necessary research work would be exhausting indeed. Using both historical and analytical methods, the author has given us a truly acceptable exposition of the new provisions. Lest the adjectives just used to describe methods should convey a false impression, let it be added that the matter is most conveniently arranged, e.g., limitation of rent provisions and those concerned with recovery of lump sums from a predecessor of the landlord are dealt with in separate chapters, and that one welcome feature of the book is copious illustration by hypothetical examples. We are also given some useful hints on what is likely to happen when such vexed questions as the meaning of " reasonable rent " and the effect of the new security of tenure proceedings have to be argued.

Statute Law Relating to Employment. By F. N. BALL, LL.B., Solicitor of the Supreme Court. Third Edition. 1949. Leigh-on-Sea : The Thames Bank Publishing Co., Ltd. 25s. net.

The Safety of Employment (Employers' Liability) Bill has been withdrawn by a private Member, as the Government intend to pass a new Act on the lines of the report of the Gower Committee. About 9,000,000 employed persons are outside the scope of the Coal Mines, Factories and Quarries Acts, and the need for further legislation is recognised by all political parties. A fourth edition of this book will thus be required, but in the meantime the third edition deals with the position arising since the publication of the second edition in October, 1946. The Factories Act, 1948, and the Law Reform (Personal Injuries) Act, 1948, have since come into force, and regulations have been issued under the National Insurance Acts. All recent decisions have been duly noted, e.g., *Stanger* v. *Hendon Corporation* (1948), 92 SOL. J. 153 on the definition of a factory under a town-planning scheme. This edition maintains the standard of its predecessors, and supplements will be issued as and when further regulations are made.

BOOKS RECEIVED

The New Requirements for Companies affecting Secretaries and Directors. By FRANK H. JONES, F.A.C.C.A., A.C.I.S., Certified Accountant and Chartered Secretary. Third Edition. 1949. pp. 27. Stanmore : Barkeley Book Co., Ltd. 2s. 6d. net.

The Trial of Nikolaus von Falkenhorst. War Crimes Trials, vol. 6. Edited by E. H. STEVENS, O.B.E., M.A., LL.B., Writer to His Majesty's Signet. With a Foreword by The Rt. Hon. Sir NORMAN BIRKETT, P.C. 1949. pp. xlii and (with Index) 278. London : William Hodge & Co., Ltd. 18s. net.

The Lawyer's Remembrancer and Pocket Book, 1950. By ARTHUR POWELL, K.C. Revised and Edited by J. W. WHITLOCK, M.A., LL.B. 1949. pp. 362. London : Butterworth & Co. (Publishers), Ltd. 12s. 6d. net.

The Modern Law Review. Vol. 12, No. 4. October, 1949. London : Stevens & Sons, Ltd. 6s. net.

Shaw's Company Guide and Diary for 1950. By GORDON E. MORRIS. 1949. pp. (with Index) 120. London : Shaw and Sons, Ltd. 8s. 6d. net.

NOTES OF CASES

COURT OF APPEAL

LEGACY TO HOSPITAL: NATIONAL HEALTH SERVICE ACT, 1946

***In re* Kellner's Will Trusts; Blundell *v.* Governors of Royal Cancer Hospital**

Sir Raymond Evershed, M.R., Somervell, L.J., and Vaisey, J.
24th October

Appeal from a decision of Harman, J. (93 SOL. J. 373.)

The testatrix by her will appointed the plaintiff executor and trustee and directed that the residue of her estate should be divided equally among eight charities, of which two were the Royal Cancer Hospital and the Cancer Research Institute, controlled by the hospital. The testatrix died on 23rd June, 1948. The question raised was to whom the legacies were payable. Harman, J., decided that the charities which the testatrix intended to benefit had ceased to exist, that the National Health Service Act had omitted to provide for the destination of such a legacy, but that the gift was a valid charitable bequest and must be administered by the Crown under the sign manual. The governors of the hospital appealed and the court allowed the appeal.

Sir R. EVERSHED, M.R., said that the National Health Service Act, 1946, came into force on 5th July, 1948, and the question was whether the terms of the Act specifically provided a destination for the legacy, and if not, how the legacy was to be disposed of. Harman, J., had held that the body designated by the testatrix had ceased to exist, but that view seemed to him (the Master of the Rolls) incorrect. The hospital was incorporated by Royal Charter in 1910 and the Minister of Health had not proceeded to exercise his powers under s. 77 (1) of the Act to amend or repeal the charter, and the corporate body created by it had therefore not been dissolved. He had not found the perusal of the Act as melancholy as the trial judge had, nor had he arrived at so depressing a conclusion. He did not consider that the draftsmen of the Act deserved the severe strictures passed on them. Section 78 (1) (*c*) dissolved certain bodies, but not the corporation, only the former committee of management. In his judgment the case was precisely covered by s. 60 (1) and the trustees must apply the trust property for the purpose of making payments, whether of capital or income, to the board of governors of the hospital under s. 60 (1) (*a*).

SOMERVELL, L.J., and VAISEY, J., concurred.

APPEARANCES: *Ungoed-Thomas*, K.C., and *H. E. Francis* (*Farrer & Co.*), for appellants; *J. A. Armstrong* (*Blundell, Baker and Co.*), *Maurice Berkeley* (*Blundell, Baker & Co.*), *Sir Frank Soskice*, S.-G., and *D. Buckley* (*Treasury Solicitor*), for charities.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

SAFE SYSTEM OF WORK: GOGGLES FOR ONE-EYED WORKMAN

Paris *v.* Stepney Borough Council

Lord Goddard, C.J., Asquith, L.J., and Vaisey, J.
27th October, 1949

Appeal from Lynskey, J.

The plaintiff was employed by the defendant council. He had suffered injuries to his left eye in an air raid in 1941. On 28th May, 1947, he was working on the back axle of a gully cleaner. He had to remove a bolt, but found that it was rusted in. He hit it with a hammer, and a chip of metal flew off and entered his right eye. As a result he lost the sight of that eye entirely, and became in effect a blind man. He was not wearing goggles at the time of the accident. Had he asked for them, he might have been provided with them, but it was not part of the council's system of work to provide goggles, and employees were not invited to use them. It was known to the council that the plaintiff had only one useful eye. The judge held that the council owed the plaintiff a duty to provide him with goggles and to require their use as part of the system of work, whether or not they owed such a duty to other of their employees. He awarded the plaintiff £5,250 damages. The council appealed.

LORD GODDARD, C.J., said that the evidence fell far short of showing a duty on an employer to supply goggles in the ordinary way. Lynskey, J., had not found that the occupation in which the plaintiff was engaged at the time of the accident was a dangerous one; but it had been argued that, because he had only one eye, the council owed him a greater duty than they owed to others because the consequences of his injuring one eye might be so much greater. The judge had confused the employers' obligation with the damage which might result to the plaintiff. The occupation was not a dangerous one, and the risk was exactly the same whether a man engaged in it had two eyes or one. It was bad luck that the splinter happened to enter the plaintiff's good eye. There was a duty on an employer to guard only against unusual dangers. The use of goggles was not a thing which it was the duty of the defendants to provide for performing that particular operation. The appeal would be allowed.

ASQUITH, L.J., agreeing, said that the plaintiff had been exposed to a risk of greater injury, which was not the same thing as a greater risk of injury.

VAISEY, J., agreed. Appeal allowed.

APPEARANCES: *Beney*, K.C., and *Everett* (*W. H. Thompson*); *Davies*, K.C., and *A. L. Stevenson* (*Thomas V. Edwards*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

NEGLIGENCE: NUISANCE: INJURY CAUSED BY CRICKET BALL

Stone *v.* Bolton and Others

Somervell, Singleton and Jenkins, L.JJ. 2nd November, 1949

Appeal from Oliver, J.

The plaintiff, while standing in a public highway, was struck and injured by a cricket ball hit by a batsman out of the adjacent cricket ground owned and occupied by the defendants, the members of a cricket club. The batsman, who belonged to a visiting team, was not sued. The club had been in existence, and matches had been regularly played on that ground, since about 1864. In 1910 the road in question was built up. The ground was protected by a fence 7 feet high, the top of the fence being 17 feet above the cricket pitch. The distance from the batsman to the fence was some 78 yards, and to the place where the plaintiff was hit just under 100 yards. The hit was quite exceptional, the evidence being that balls had on rare occasions been hit over the fence during a match during the previous years. The plaintiff claimed in negligence and, alternatively, in nuisance. Oliver, J., held that there was no negligence, in that the ground was quite large enough for practical purposes of safety, since in thirty-eight years no one had been injured in that way before; that the playing of cricket was a natural use of the land, so that *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, did not apply; and that the claim in nuisance also failed because a nuisance must be a state of affairs and not merely an isolated happening. The plaintiff appealed. (*Cur. adv. vult.*)

SINGLETON, L.J., said that the contention that the club caused a public nuisance in promoting cricket matches on the ground failed in spite of the evidence that cricket balls had from time to time been hit over the fence and into the road; for there was nothing to show that before the plaintiff's accident any discomfort to or interference with anyone had been caused. The playing of cricket on the ground did not constitute a public nuisance by reason that occasionally—and it was very seldom—a ball was hit into the road. As for the claim in negligence, as balls had occasionally been hit into the road, the club clearly knew that there was a risk that any day a ball might be hit into the road. There was, therefore, a duty on the occupiers of the ground to take reasonable care to prevent injury or damage to anyone on the highway. They ought to have considered how that could be done, and there was no evidence that they had ever done so. It was most undesirable that a high standard should be applied in a case like the present. If the club had considered the matter and decided that the risks were very small and that they need not do very much, there might have been something to be said for them. So far as the evidence showed, they did nothing. That being so, they were failing in their duty either to take reasonable care to consider how the risk to anyone in the road could be reduced or, further, to take reasonable steps to reduce a danger which could be foreseen. The appeal should be allowed and judgment entered for the plaintiff for the amount of damages assessed.

JENKINS, L.J., said that it would be placing an unreasonably heavy burden on the club to hold them under an unqualified duty to prevent cricket balls from being hit into the road in any circumstances. There was, however, no justification for holding the club entitled to subject people in the road to any reasonably foreseeable risk of injury in that way. They were under a duty to prevent balls from being hit into the road, for there clearly was such a risk here. If cricket could not be played on a ground without foreseeable risk of injury to persons outside it, it was always possible, in the last resort, to stop using the ground for cricket.

SOMERVELL, L.J., agreed that the claim in nuisance must fail. He would dismiss the appeal also on the question of negligence. He thought the case a borderline one, and that, on the evidence as accepted by Oliver, J., the plaintiff had failed to establish that her injury was due to the club's failure to take due and reasonable care. He agreed with his brethren that *Rylands* v. *Fletcher, supra*, had no application to the case. Appeal allowed. Leave to appeal to the House of Lords.

APPEARANCES: *Nelson*, K.C., and *H. Burton* (*L. Bingham and Co.*, for *Linder, Myers & Pariser*, Manchester); *F. H. Dean* (*Hall, Brydon, Harvey & Egerton*, for *Hall, Brydon & Chapman*, Manchester).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

ERRATUM

In our report of *In re Duke of Norfolk's Will Trusts; Public Trustee* v. *Inland Revenue Commissioners*, at p. 694, *ante*, the reference to *In re Cassel* at lines 9 and 10 of the judgment should read "*In re Cassel's Will Trusts* [1947] Ch. 1, at p. 8." At lines 15-16 of the judgment, for the reference to "*In re Cassel, supra,*" substitute "*In re Cassel* [1927] 2 Ch. 275."

KING'S BENCH DIVISION

EXCESS PROFITS TAX: VALUATION OF STOCK-IN-TRADE

Inland Revenue Commissioners *v.* Cock, Russell & Co., Ltd.

Croom-Johnson, J. 3rd November, 1949

Appeal from the City of London Income Tax General Commissioners.

The respondent company were wholesale wine and spirit merchants. The value of wine fell at the end of 1945, and for the purpose of their profit-and-loss account for the year ending 31st December, 1945, they valued at market value part of their stock of port wine which had fallen in value to less than cost price, and valued at cost price that part of their stock the cost of which was less than its market value. The Crown contended that the whole stock should have been valued at its cost price. The company contended that each item of stock was properly valued on the basis of the lower of its own cost or market value in accordance with recommendations on accounting principles issued by the Institute of Chartered Accountants. The Commissioners held that the method of valuation adopted by the company was in accordance with the practice of the trade. The Crown appealed.

CROOM-JOHNSON, J., said that this was a question of fact. Unless the Commissioners had applied a wrong principle, the appeal must fail. There was no enactment or rule which disentitled them from finding as they had. Sound principles of commercial accounting should be applied in ascertaining profit and gains, unless a statute or rule otherwise provided. The appeal would be dismissed.

APPEARANCES: *Grant*, K.C., and *Hills* (*Solicitor of Inland Revenue*); *Donovan*, K.C., and *Coen* (*Gouldens*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

ESTATE AGENT'S COMMISSION: "IN THE EVENT OF BUSINESS RESULTING"

Murdoch & Lownie, Ltd. *v.* Newman

Slade, J. 24th October, 1949

Action.

The plaintiffs, estate agents, claimed £707 10s. commission alleged to be due to them from the defendant in respect of negotiations for the sale of a hotel of which he was the proprietor. They claimed that their predecessors in title had introduced to the defendant one Graham who was ready, willing and able to purchase the hotel for £37,500, the price stipulated by the defendant; that Graham and the defendant had entered into an agreement by which Graham had agreed to purchase the hotel for that sum; and that the agents were therefore entitled to commission. The defendant contended that any such agreement was subject to its being possible to arrange a mortgage for £25,000, secured on the site of the hotel, and that it had been impossible to do so.

SLADE, J., said that the estate agents had written to the defendant asking him if he was prepared to sell the hotel to a special client of theirs, and stating that they presumed "in the event of business resulting that we can look to you for the usual scale commission authorised by the recognised institution." The plaintiff replied that he would be willing to see that client, adding, "last paragraph of your letter quite understood." The construction of those letters was purely a matter of law. He (his lordship) held that by them the agents were entitled to commission "in the event of business resulting" through their efforts. Three possible constructions of the phrase "business resulting" had been advanced: it could include the introduction by the agents to the defendant of (*a*) a party ready, willing, and able to purchase the property on terms acceptable to the defendant vendor; (*b*) a party who entered into a binding contract with the vendor for the purchase of the property; or (*c*) a party who not only entered into such a contract but who had actually completed the purchase. It was argued for the agents that (*a*), or, alternatively, (*b*) was the proper construction. It was argued for the defendant that (*c*), or, alternatively, (*b*) was the correct one. In *Dudley Bros. & Co.* v. *Barnet* [1937] S.C. 632, the Court of Session had held in a similar case that (*a*) was the correct construction. He (his lordship) felt unable to follow that decision. In his opinion the words "business resulting" on their true construction required at least that a binding contract to purchase the property should be entered into. *Dudley Bros. & Co.* v. *Barnet, supra*, came before the decision of the House of Lords in *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* [1941] A.C. 108; 85 SOL. J. 105, where it was laid down that there was no implied term that the principal should not so act as to prevent the agent from earning his commission. Here the person introduced had only agreed to purchase the hotel subject to a mortgage on it being arranged to the amount of £25,000. Subsequently, the defendant had been anxious not to proceed with that agreement and it had been mutually rescinded. At the most the agreement was one by which the prospective purchaser undertook to use his best endeavours to obtain £25,000 on mortgage. It was not a binding contract to purchase. It was not necessary to decide the point, but in fact, Graham would not have been able to complete the purchase. Judgment for the defendant.

APPEARANCES: *Astell Burt* (*Geoffrey B. Gush & Co.*); *Cartwright Sharp*, K.C., and *Neil Lawson* (*J. S. L. Coxwell*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

PROOF OF PREVIOUS CONVICTIONS: PROCEDURE

R. *v.* Dickson

Lord Goddard, C.J., Hilbery and Lynskey, JJ.
31st October, 1949

Appeal against sentence.

The appellant was sentenced at Bristol Assizes to ten years' preventive detention for receiving stolen property. He appealed against that sentence.

LORD GODDARD, C.J., giving the judgment of the court, said that s. 21 of the Criminal Justice Act, 1948, provided for two new forms of sentence, preventive detention and corrective training; but s. 23 (1) laid down two conditions which must be fulfilled before those sentences could be passed: notice of intention to prove previous convictions should be served on the prisoner three days before his trial, and he should be asked whether he admitted them. The subsection did not say that the admission must be made in open court. The various new provisions of the Act of 1948 to some extent complicated what used to be the simple procedure of sentencing prisoners. The question arising on the present appeal was of a highly technical nature. The appellant had pleaded guilty to two offences of a very serious character. Notice of intention to prove three specified previous convictions was duly served on him in compliance with s. 23 (1), and he made a signed admission on the notice of those three convictions. Unfortunately evidence was not given at the trial that the notice had been served, and he was not asked whether he admitted the previous convictions. The only thing said in court was the statement by a police officer that s. 21 (5) of the Act had been complied with in that a copy of the Prison Commissioners' report had duly been served on the prisoner. The judge, having before him the notice of intention to prove previous convictions which bore the prisoner's signed admission of them, probably forgot that the convictions had to be put to him in court. In the opinion of the court the proper procedure to be adopted in all courts in the matter of proving previous convictions was that, first, after a plea, or a verdict, of guilty, a police officer should be called by counsel for the prosecution, who should prove that the officer had served on the prisoner three days before the trial notice of intention to prove previous convictions. Secondly, the clerk of assize or of the peace, as the

case might be, should put to the prisoner the convictions mentioned in the notice and obtain his admission or denial of them in open court. Thirdly, there must then be handed to the prisoner or his counsel a copy of the Prison Commissioners' report. When all that had been done, the proceedings would be in order. The court expressed at the present stage no opinion on what the judge should do if a prisoner, having admitted the previous convictions when notified of intention to prove them, then in court withdrew his admission and denied them. As the requisite formalities had not been observed in the present case, the court felt obliged to set aside the sentence of preventive detention. On the question of procedure, the court had stated in *R.* v. *Allen* (*ante*, p. 696) that it would be desirable, although not required by law, to include an averment of previous convictions in the indictment. The attention of the court had been called to the fact that that might cause difficulty, because at heavy assizes it was not always known that the police were going to put forward previous convictions as qualifying for sentence of preventive detention or corrective training. The court was therefore of opinion that one of two courses should be taken for the future: either the previous conviction should be averred in the indictment as suggested in *R.* v. *Allen*, *supra*, or, as had been done in the present case, the notice of intention to prove previous convictions which had been served on the prisoner should be attached to the indictment. That would constitute a sufficient reminder to the court of the statutory procedure which must be followed. Sentence of seven years' imprisonment substituted.

APPEARANCES: *Burge* (*Freeborough & Co.*). The prosecution did not appear and were not represented.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read the First Time:—

Coal Industry (No. 2) Bill [H.C.]. [2nd November.
Telegraph Bill [H.C.] [1st November.

Read the Second Time:—

National Health Service (Amendment) Bill [H.C.]. [1st November.

Read the Third Time:—

Aberdeen Harbour Order Confirmation Bill [H.C.]. [2nd November.
Agricultural Holdings (Scotland) Bill [H.L.]. [3rd November.
Marriage Bill [H.L.]. [3rd November.
Overseas Resources Development Bill [H.C.]. [1st November.

B. DEBATES

The Second Day of Committee on the **Justices of the Peace Bill** continued with LORD MERTHYR moving an amendment designed to transfer from the Home Secretary to the Lord Chancellor the duty of appointing persons to juvenile panels in London. He could not understand why the Lord Chancellor should appoint them everywhere else and not in London. VISCOUNT TEMPLEWOOD supported this because there should be a sharp division between the Executive and the Judiciary, and these were judicial posts. LORD JOWITT was not prepared to take on this further responsibility. London was a special case because of the amount of work its juvenile courts had to deal with, and he had never had the slightest difficulty with the Home Secretary in working the present arrangement. The amendment was withdrawn.

In moving a new clause giving him power to appoint a committee comprising the Lord Chief Justice, the President of the Probate, Divorce and Admiralty Division and others to draw up rules governing the practice and procedure in magistrates' courts, the LORD CHANCELLOR said he wanted considerable latitude as to the composition of the committee. LORD SCHUSTER suggested that the *custos rotulorum* should be included. LORD GODDARD suggested that the Rule Committee of the Supreme Court could adequately deal with this matter. LORD ROCHE welcomed the clause as following the recommendations of the Roche Committee, and it was agreed to.

LORD LLEWELLIN moved an amendment giving the new magistrates' courts committees the duty of arranging and administering courses of instruction for magistrates. VISCOUNT TEMPLEWOOD agreed that this was preferable to a department of the Executive imposing these courses on the justices, and the LORD CHANCELLOR said he willingly accepted the amendment. The MARQUESS OF EXETER wished to see the *custos rotulorum* as a member of these committees, and the LORD CHANCELLOR undertook to look into this suggestion. LORD MERTHYR withdrew an amendment designed to give the committees power to submit to the Secretary of State proposals for setting up, where appropriate, one juvenile court for a combined area. The LORD CHANCELLOR explained that since, under existing provisions, anyone, even a member of the public, could make such proposals, *a fortiori* the magistrates' courts committee could do so. A further amendment was also withdrawn by LORD MERTHYR on his being assured that under the Bill there was power for the committees to make proposals to the Lord Chancellor for the grouping of a number of petty sessional divisions together in order to enable a full-time clerk to be employed. An amendment by LORD LLEWELLIN to the effect that the clerk should be consulted by the committee before any staff were engaged or dismissed, otherwise than by the clerk himself on its behalf, was welcomed and accepted by LORD JOWITT.

The LORD CHANCELLOR agreed to look into a suggestion by Lord Llewellin that the clerk himself should have power to make his own representations to the Secretary of State when the latter had under consideration, with a view to confirmation, a dismissal of the clerk by a committee in those cases in which the Bench disagreed with the committees' decision. LORD JOWITT next moved a new clause to prohibit clerks from acting professionally in connection with the general annual licensing meeting, transfer sessions, etc., and from preparing notices and forms in connection with licensing applications. LORD SCHUSTER thought no harm was done by merely seeing that the forms were in proper order, and that clerks would suffer a grievous wrong if they were deprived of the income derived therefrom. LORD ROCHE also thought the clause wrong, but it was agreed to on the Lord Chancellor's undertaking to receive representations on the subject.

LORD MORRIS moved to insert in the clause dealing with the qualifications of justices' clerks a provision that solicitors who have served in certain capacities for not less than five years and *then* qualified should not then have to wait a further five years before being eligible for appointment as clerks. The LORD CHANCELLOR sympathised with this point of view and undertook to introduce a provision of his own on these lines at a later stage. LORD MIDDLETON proposed that any person, not being a barrister or solicitor, whose service had rendered him eligible for appointment as clerk under s. 7 of the Justices' Clerks Act, 1877, should continue to be so eligible. He said that many lay magistrates and others were deeply concerned that the clerks should be qualified men, but they should also wish to avoid hardships to those who had aspired to clerkships and were at present eligible to serve. LORD CALVERLEY said that in many great industrial centres the clerks were "qualified men," but not solicitors. He did not want to see them condemned to a blind-alley occupation. The LORD CHANCELLOR agreed, but suggested a time-limit of five or ten years beyond which the system of unqualified clerks should not continue. He would explore the difficulties and himself introduce a provision at the Report Stage. [25th October.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read the First Time:—

Charity of Walter Stanley in West Bromwich Bill [H.C.]. [2nd November.

To confirm a Scheme of the Charity Commissioners for the application or management of the Charity of Walter Stanley, in the Ancient Parish of West Bromwich, in the County of Stafford.

Fife County Council Order Confirmation Bill [H.C.]. [4th November.

To confirm a Provisional Order under the Private Legislation Procedure (Scotland) Act, 1936, relating to Fife County Council.

War Damaged Sites Bill [H.C.] [1st November.

To enable local authorities to take possession of or do work on certain war damaged land; to authorise the conversion of cost of works payments in certain cases; and for purposes connected with the matters aforesaid.

Read the Second Time :—

Local Government Boundary Commission (Dissolution) Bill [H.C.]. [2nd November.

Parliament Bill [H.C.]. [31st October.

Profits Tax Bill [H.C.]. [3rd November.

Read the Third Time :—

Expiring Laws Continuance (No. 2) Bill [H.L.]. [4th November.

New Forest Bill [H.L.]. [1st November.

Nurses Bill [H.C.]. [4th November.

B. QUESTIONS

Mr. GAITSKELL stated that on 9th September the Barnsley magistrates' court had been erroneously informed that a fine had been imposed by the National Coal Board upon a person alleged to have committed larceny. The Board did not exercise or seek to exercise any jurisdiction in criminal matters. [31st October.

The SOLICITOR-GENERAL, in giving a general review of the work of the Statute Law Committee since the revision of its terms of reference in 1947, stated that in 1947-48 four consolidation Bills—the Companies, Agricultural Wages, Agricultural Holdings and National Service Bills—had been passed. The Consolidation of Enactments (Procedure) Bill had been passed and the Marriage Bill and the Vehicles (Excise) Bill showed the advantage of the new procedure. A new Bill dealing with elections was proposed for this session. Work was proceeding on three large undertakings—Income Tax, Customs and Excise, and the work of magistrates' courts. To reduce the bulk of the published volumes of the Statutes, a third edition of the "Statutes Revised" was necessary and for this purpose a Statute Law Revision Bill had been passed. It was hoped to publish the thirty-three volumes before the end of the year. The committee had directed the publication of "Directions for Noting" simplified so that anyone could keep the volumes in the same form as those used in the Statutory Publications Office itself.

A new edition of "Statutory Rules and Orders and Statutory Instruments Revised" was in train and publication would begin early next year. A new "Consolidated Index to Local Acts" was being printed and would be published in November. [31st October.

Sir FRANK SOSKICE stated that the question whether to introduce legislation to implement the recommendations of the Evershed Committee as regards the creation of additional High Court judges was under consideration. [31st October.

STATUTORY INSTRUMENTS

Assistant Nurses (Amendment) Rules, Approval Instrument, 1949. (S.I. 1949 No. 1986.)

Carrots Order, 1949. (S.I. 1949 No. 1978.)

Control of Bolts, Nuts, etc. (No. 19) Order, 1949. (S.I. 1949 No. 1968.)

Control of Iron and Steel (No. 74) Order, 1949. (S.I. 1949 No. 1967.)

Cotton Waste Prices Order, 1949. (S.I. 1949 No. 2004.)

Feeding Stuffs (Prices) (Amendment No. 4) Order, 1949. (S.I. 1949 No. 2009.)

Draft **Gas** (Staff Compensation) Regulations, 1949.

General Hollow-ware (Maximum Prices) Order, 1949. (S.I. 1949 No. 1971.)

Gold Coast Colony and Ashanti (Legislative Council) (Amendment) Order in Council, 1949. (S.I. 1949 No. 1998.)

Goods Vehicles (Restriction of Use) (Appointed Day) Order, 1949. (S.I. 1949 No. 1979.)

Hull and East Yorkshire River Board Area Order, 1949. (S.I. 1949 No. 1992.)

Isles of Scilly (Importation of Animals Regulations) Order, 1949. (S.I. 1949 No. 2012.)

Knitted Goods (Manufacture and Supply) (Amendment) Order, 1949. (S.I. 1949 No. 1991.)

Linen and Cotton Handkerchief and Household Goods and Linen Piece Goods Wages Council (Great Britain) (Constitution) Order, 1949. (S.I. 1949 No. 1974.)

Draft **Metropolitan Police Staffs** Superannuation Order, 1949.

Motor Fuel (Overseas Aircraft) Licence and Direction, 1949. (S.I. 1949 No. 1980.)

National Insurance and Industrial Injuries (Reciprocal Agreement with France) Order, 1949. (S.I. 1949 No. 2011.)

National Insurance (Claims and Payments) Amendment (No. 2) Provisional Regulations, 1949. (S.I. 1949 No. 1982.)

National Insurance (General Benefit) Amendment Regulations, 1949. (S.I. 1949 No. 1984.)

National Insurance (General Benefit) Amendment (No. 2) Provisional Regulations, 1949. (S.I. 1949 No. 1985.)

National Insurance (Medical Certification) Amendment Regulations, 1949. (S.I. 1949 No. 1981.)

National Insurance (Modification of Local Government Superannuation Schemes) (Scotland) (Amendment No. 2) Regulations, 1949. (S.I. 1949 No. 1989 (S139).)

National Insurance (Unemployment and Sickness Benefit) Amendment (No. 2) Regulations, 1949. (S.I. 1949 No. 1983.)

Nigeria (Legislative Council) (Amendment) Order in Council, 1949. (S.I. 1949 No. 2001.)

Nigeria Legislative Council (Extension of Tenure of Offices) Order in Council, 1949. (S.I. 1949 No. 2002.)

Nigeria (Protectorate and Cameroons) Order in Council, 1949. (S.I. 1949 No. 2003.)

Northern Territories (Amendment) Order in Council, 1949. (S.I. 1949 No. 1999.)

Nurses (Amendment) Regulations, 1949. (S.I. 1949 No. 1987.)

Nurses (Amendment No. 2) Rules, Approval Instrument, 1949. (S.I. 1949 No. 1994.)

Reports to Local Authorities (Records) Amending Regulations, 1949. (S.I. 1949 No. 1970.)

Returning Officers' Expenses (Northern Ireland) Regulations, 1949. (S.I. 1949 No. 2020.)

Superannuation (Local Government and Colonial Service) (Scotland) Interchange Rules, 1949. (S.I. 1949 No. 1988 (S138).)

Superannuation (Local Government, Social Workers and Health Education Staff) (Scotland) Interchange Rules, 1949. (S.I. 1949 No. 1990 (S140).)

Tame, Seamer and Picton Drainage District (Reconstitution of Drainage Board) Order, 1949. (S.I. 1949 No. 2022.)

Teachers' Superannuation (Royal Air Force Education) Scheme, 1949. (S.I. 1949 No. 2007.)

Teachers' Superannuation (Royal Navy Education) Scheme, 1949. (S.I. 1949 No. 2008.)

Togoland under United Kingdom Trusteeship Order in Council, 1949. (S.I. 1949 No. 1997.)

Town and Country Planning (Control of Advertisements) (Scotland) Amendment Regulations, 1949. (S.I. 1949 No. 2016 (S142).)

Town and Country Planning (Minerals) Regulations, 1949 (S.I. 1949 No. 1996.)

By these regulations s. 63 of the Town and Country Planning Act, 1947 (which excludes certain small claims from a right to compensation from the global sum), is relaxed to a certain extent. The regulations also provide that a claim for compensation by a person holding a mining lease is to be treated as if it were a claim by all other persons entitled to claim in respect of mineral interests in the land. Regulation 7 of the Town and Country Planning (Minerals) Regulations, 1948, is also extended to cases in which the claim includes both mineral bearing land which is worked or held by a mineral undertaker, and buildings, plant and machinery for processing minerals.

Town and Country Planning (Minerals) (Scotland) Regulations, 1949. (S.I. 1949 No. 2015 (S141).)

Towyn Drainage District (Reconstitution of Drainage Board) Order, 1949. (S.I. 1949 No. 2021.)

War Damage (Remitted Claims) Regulations, 1949. (S.I. 1949 No. 2019.)

As to these regulations, see p. 700, *ante*.

Wild Birds Protection (Berkshire) Order, 1949. (S.I. 1949 No. 2014.)

Yorkshire Ouse River Board Area Order, 1949. (S.I. 1949 No. 1993.)

NOTES AND NEWS

Professional Announcement

Messrs. R. & R. F. KIDD, of 100 Howard Street, North Shields, have taken into partnership Mr. NORMAN STOCKDALE, LL.B., L.A.M.T.P.I., as from the 1st November. The name of the firm and its place of business remain unchanged.

Honours and Appointments

The Attorney-General has appointed Mr. J. GLYN BURRELL prosecuting counsel to the Post Office on the Northern Circuit in succession to Mr. B. S. Wingate-Saul.

Mr. J. H. A. CAESAR, who has been senior assistant solicitor to Huddersfield corporation since July, 1948, has been appointed deputy town clerk of Rochdale.

Mr. H. EDWIN SCOTT, solicitor, of Keighley, has been appointed divisional commander of the Special Constabulary in Keighley division.

Major J. G. FARDELL, solicitor, of Ryde, I.o.W., who is clerk to the Ryde borough and county justices, registrar to the county court and deputy coroner for the island, has been reappointed president of the Ryde branch of the British Legion, an office he has held several years.

Mr. A. N. WHISTON, solicitor, of Derby, at present coroner for the district of Morleston and Litchurch, is to be appointed coroner for South Derbyshire, a new district including his present area, on the forthcoming retirement of Mr. R. W. Sale, solicitor, of Derby, from the coronership for the Hundred of Appletree.

The Lord Chancellor has appointed Mr. ROLAND GILBERT BEDWORTH to be the joint registrar of Birmingham and Redditch county court and joint district registrar in the district registry of the High Court of Justice in Birmingham as from the 1st November, 1949 (*vice* Mr. A. D. Murfin).

The Lord Chancellor has appointed Mr. ALFRED DENNIS MURFIN to be the registrar of Hanley and Stoke-upon-Trent, Leek, Newcastle-under-Lyme, Stone and Uttoxeter county courts, and district registrar in the district registry of the High Court of Justice in Hanley as from the 1st November, 1949 (*vice* Mr. C. E. Woosnam, O.B.E., deceased).

Personal Notes

Messrs. Blandy and Blandy, solicitors, of Friar Street, Reading, were runners-up for the cup awarded to the Reading firm employing up to 75 employees showing the greatest increase during the year in national savings. Their increase was 181 per cent.

Major Joseph Duke, clerk to Ilminster magistrates for forty-two years and before that six years deputy clerk, is to retire.

Second woman in West Bromwich to become a qualified solicitor, Miss Mary Clark is to leave the profession early in January to marry Mr. Donald Geoffrey Lynall, a director of a Birmingham screw manufacturing firm.

Mr. A. P. Marsh, who is clerk to the Melton Mowbray (Leicestershire) magistrates and Melton rural district council, is resigning from his post as registrar of Melton and Oakham (Rutland) county courts. He succeeded his father, Mr. A. H. Marsh, as registrar in 1923.

Miscellaneous

The Law Society announces that at the Preliminary Examination held on the 12th and 13th October, 1949, seventeen candidates were successful out of a total of sixty-six.

Under the County Court Districts (Miscellaneous) Order, 1949 (S.I. 1949 No. 2029), which comes into operation on 30th November, 1949, (*a*) the Diss and Harleston County Court will cease to be held at Harleston and will be held at Diss by the name of the Diss County Court, and a number of parishes set out in the schedule to the order are transferred from the Diss County Court District to the County Court Districts of Norwich, Eye and Halesworth, and Saxmundham; (*b*) the parishes of Chedgrave, Kirstead, Loddon, Mundham and Seething are transferred from the Beccles County Court District to the Norwich County Court District.

I, WILLIAM ALLEN VISCOUNT JOWITT, Lord High Chancellor of Great Britain, by virtue of the County Courts Act, 1934, and all other powers enabling me in this behalf, Do hereby order as follows:—

1. His Honour Judge Armstrong shall cease to be the Judge for the district of the Lymington County Court, and His Honour Judge Tylor, K.C., shall be the Judge for the said district in addition to the districts for which he is now the Judge.

2. His Honour Judge Pratt shall cease to be the Judge for the district of the Langport County Court and His Honour Judge Armstrong shall be the Judge for the said district in addition to the districts for which he is now the Judge.

3. This Order shall come into operation on the 1st day of January, 1950.

Dated the 2nd day of November, 1949. JOWITT, C.

SOCIETIES

At the annual general meeting of the BROMLEY AND DISTRICT LAW SOCIETY, held on the 28th October, the following officers were appointed: Mr. Stanley O. Matthews, President; Mr. C. E. Latter and Mr. C. E. Staddon, vice-Presidents; Mr. P. Lee, Honorary Secretary; Mr. C. D. Gregory, Honorary Treasurer; and Messrs. R. D. Birrell, E. G. S. Cook, L. Kaye, G. H. Kirby-Smith, R. S. Miller, C. J. de S. Root and P. S. Stowe were elected to the Committee.

The first annual general meeting of the MID-SURREY LAW SOCIETY was held at the Guildhall, Kingston-on-Thames, on Wednesday, the 26th October. Mr. A. F. Stapleton Cotton, of Epsom, was elected President, and Messrs. W. E. Farquharson, of Surbiton, and A. W. Forsdike, of Kingston, were elected vice-Presidents. Mr. G. A. Smith, of New Malden, was re-elected Hon. Secretary and Treasurer. The members of the Committee are as follows: Messrs. N. F. Burge, R. A. Hodges, G. E. Reed, A. Copley-Clark, H. C. G. Lake, L. F. Biden, E. Dodds, J. C. Carter, J. E. Calvert-Smith, G. E. Baker, J. C. Cotton and Miss M. M. White. The Society held its first annual dinner and dance on the 11th November, 1949.

The next quarterly meeting of the LAWYERS' PRAYER UNION will be held at The Law Society's Hall, Bell Yard, W.C.2, on Monday, 14th November, at 6 p.m. Tea available from 5.30 p.m. The meeting, to which all lawyers, law students and visitors are warmly welcome, will be addressed by M. Garton, Esq., District Judge, Kuala Lumpur, on the subject "Law and Grace in Malaya."

On Monday, 31st October, 1949, the members of the UNITED LAW SOCIETY met in the Gray's Inn Common Room at 7.15 p.m. and debated the motion "That this House disapproves of the Legal Aid and Advice Act, 1949." The debate was opened by Mr. J. R. Bracewell, whose criticism was directed mainly at the detailed provisions of the Act, though he did suggest that the very existence of the Act was a danger in itself as it might mean but one step towards nationalisation of the professions. In the detail of the Act, its scope was too wide and it was wrong to provide aid through the State organisation. It would have been far better to have kept the old scheme with enlarged limits. Mr. J. N. Collins opposed the motion on the ground that the Act was an important social measure which was not merely a piece of a political programme. There also spoke Messrs. A. Garfitt, O. T. Hill, R. Blackford, S. E. Redfern, D. N. Keating, L. G. Cullen, R. N. Hales, M. J. Beasley, F. H. Butcher and W. S. Holliday. The motion was lost by nine votes to five.

The UNITED LAW SOCIETY announces the following subjects for debate in November (meetings in Gray's Inn Common Room, Gray's Inn, W.C.1, commencing at 7.15 p.m. promptly):—

Monday, 14th November, 1949: "That this House is in favour of single chamber government." Monday, 21st November, 1949: "That this House disapproves of the increasing tendency to confer judicial powers on Government officials." Monday, 28th November, 1949: "That man is what woman makes him."

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